

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6006

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Mary Cox, as Administratrix of the
goods, chattels and credits of
Bobby Cox, deceased,

plaintiff-appellant,

- against -

Administrator of the Veterans Admini-
stration, Veterans Administration,
United States of America,

defendants-appellees.

B
DOCKET # 77-6006

REPLY MEMORANDUM OF PLAINTIFF-APPELLANT

GERALD MURRAY, ESQ.
attorney for plaintiff-appellant
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Jamaica, New York 11435
212-RE9-6672

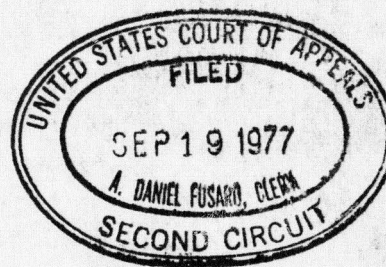


TABLE OF CONTENTS

- I. GENERAL STATEMENT
- II. THE LAW
- III. CONCLUSION

REPLY BRIEF OF PLAINTIFF-APPELLANT

The following is not meant to be a complete reply because it is expressly believed by the undersigned that it is amply covered by his brief in chief.

However, one case has come to the attention of the undersigned, subsequent to the drafting of the brief.

This case clearly is applicable to the case at bar and indicates that although a physician follows an accepted medical practice procedure, he still may very well be liable for malpractice, if he has an error in judgment. I refer to my brief and also on pages 7 and 8 of the Government's brief where they clearly indicate from the testimony that it was a question of judgment.

II THE LAW

In the case of Toth vs. Community Hospital at Glencove, 22 N. Y. 2d, 255, 1968, the following quotation and of course reference to the entire case illustrates this point quite lucidly. On page 262 the court states, "Although a plaintiff in a medical practice case does not always require expert testimony to establish a prima facie case (Benson vs. Dean, 232 N. Y. 52; Meiselman vs. Crown Hgts. Hosp., 285 N. Y. 389; Hammer vs. Rosen, 7 N Y 2d 376), evidence that a physician conformed to accepted community standards of practice usually insulates him from tort liability (Benson vs. Dean, supra, p. 58; Prosser, Torts (3d ed.), p. 168; see, also, McCoid, Liability of Medical Practitioners, 12 Vanderbilt L. Rev. 549, 605 ff). There is, however, a second principle involved in medical malpractice cases. Having its genesis in the reasonable man rule, this principle demands that a physician should use his best judgment and whatever superior knowledge, skill and intelligence he has (Prosser, op. cit., p. 164.) Thus, a specialist may be held liable where a general practitioner may not. The principle has been accepted by the Restatement of the Law of Torts (Restatement 2d, Torts, section 299A, comment c; section 289, subd. (b) and comment m; section 299, comment f; see, also Harris vs.

Fall, 177 F. 79; cf. Note, Duty of a Manufacturer to Discover Unforeseeable Common Uses of His Product, 66 Col. L. Rev. 1190, 1192-1193)."

And on page 263 the court states,

"The necessary implication of this latter principle is that evidence that the defendant followed customary practice is not the sole test of malpractice. If a physician fails to employ his expertise or best judgment, and that omission causes injury, he should not automatically be freed from liability because in fact he adhered to acceptable practice. There is no policy reason why a physician, who knows or believes there are unnecessary dangers in the community practice, should not be required to take whatever precautionary measures he deems appropriate."

"It is not unreasonable to impose upon a physician, who believes that added precautions are necessary, the obligation that he act diligently in taking the necessary safety measures. This conclusion is nothing more than an application of the rule that a physician should at all times use his own best judgment and care."

Prosser on Torts, page 164 supra states as follows of interest to the case at bar, "Formerly it was generally held that allowance must be made for the type of community in which the

physician carries on his practice, and for the fact, for example, that a country doctor could not be expected to have the equipment, facilities, libraries, contacts, opportunities for learning, or experience afforded by large cities. Since the standard of the "same locality" was obviously too narrow, this was commonly stated as that of "similar localities," thus including other towns of the same general type. Improved facilities of communication, available medical literature, consultation and the like, led gradually to the abandonment of any fixed rule, and to treating the community as merely one factor to be taken into account in applying the general professional standard. In a few jurisdictions the "locality rule" has been entirely discarded, and the general standard applied in all cases.

Also see *Whitree v. State of N. Y.* 56 Misc 2d 693 holding state liable for malpractice where no competent professional judgment was made as in case at bar where there was a failure to examine plaintiff's decedent on attempted re-entry to hospital per testimony of Mary Cox McNeil, pages 80A, 81A, 82A, 83A and 84A.

III CONCLUSION

In its applicability to the case at bar, it is very clear that releasing a mental patient who may have a danger of committing suicide requires the best judgment of the treating physician and the refusal of re-admission without a physician making any judgment whatsoever, and this point alone, and it is respectfully submitted requires a reversal of the judgment below and a decision in favor of the plaintiff-appellant or at the very least in the alternative a new trial in view of the testimony of Dr. Kovacs herein on page 241 of the trial transcript, 234A of the appendix, where the doctor indicated that it was poor judgment. Incidentally Dr. Kovacs was correct in saying poor judgment can be poor medical practice and this case cited by the Court of Appeals upholds the doctor's view legally, that is the answer to his query in the trial court.

Respectfully submitted,

GERALD MURRAY

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Mary Cox, as Administratrix of the Goods,
Chattels and Credits of Bobby Cox, deceased,

Plaintiff,

against

Administrator of the Veterans Administration,
Veterans Administration, United States of
America,

Defendant.

Index No.

Docket No# 77 6006

PROOF OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF QUEENS

ss.:

The undersigned, attorney at law of the State of New York affirms: }
Gerald Murray, being duly sworn, deposes and says: } that deponent is
attorney(s) of record for
plaintiff, appellant

Deponent is not a party to the action, is over 18 years of age and resides at
90-61 Sutphin Blvd., Jamaica, New York

That on the 2nd day of September, 19 77 deponent served the annexed
Reply Brief

(in triplicate)

on Robert B. Fiske, Jr., Esq.
attorney(s) for defendant-appellee,

in this action at One St. Andrew's Plaza, New York, N.Y. 10007

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care
and custody of the United States post office department within the State of New York.

(The undersigned attorney affirms the foregoing statement to be true under the penalties of perjury.)

Sworn to before me (Dated:)

this 2nd day of September, 1977

The name signed must be printed beneath
GERALD MURRAY

Docket # 77-6006

Index No.

United States Court of Appeals
For the Second Circuit

Mary Cox etc.,

Plaintiff ,

against

Administrator of the Veterans
Administration, etc.,

Defendant .

**AFFIDAVIT OR AFFIRMATION
OF SERVICE**

A1468

MR. ARSHT: We will try not to.

MR. MORRIS: May it please the Court, before asking Mr. Levy to come forward and present our position I should like to hand up to the Court a supplemental affidavit in support of our motion for injunctive relief, executed by Mr. Carl Glick. I am now delivering copies of this short affidavit to Mr. Finger and Mr. Arsht.

THE COURT: Let it be marked as filed in open court.

MR. ARSHT: I hope there was delivered to your Honor within the past hour the affidavits and answer on behalf of the defendants in this case.

THE COURT: Yes, I have read them.

MR. LEVY: Good morning, your Honor. May I first say that it is always a pleasure to come to Delaware and argue in this courthouse, and I appreciate the opportunity.

We appear for the plaintiff, David J. Greene & Company, or the various plaintiffs which include David J. Greene & Company, an investment banking firm in the City of New York. As the supplemental affidavit just handed up relates, David J. Greene & Company, its partners, members of their families, and clients are the owners of 50,000 shares of Schenley stock, which by voting on the stock, depending

obviously cannot sit here and resolve the back and forth, to say that there has not been a sufficient showing of probability of proving the fairness of this plan on the papers that have been presented.

I would like briefly to take up what it is that is involved in the substantive aspects of the problem. We have of course two ends to the package. One is, what is Glen Alden giving, and the other is what do the Scheeley stockholders have and how do you correlate the values.

Before doing that, however, I want to make one point which to me has significance. When you boil this down this is really a freeze-out by the majority stockholder of the public minority stockholders of Schenley because the public minority stockholders of Schenley henceforth are going to have no further interest in this business as equity owners. They are going to have the cash, and they do with it, and a debenture, and that makes them a creditor and not a shareholder.

On the other hand, Glen Alden is going to take unto itself 100% of this operating business, and most important, 100% of its surplus cash. That surplus cash is largely ignored in the affidavits of my friends' experts, but that surplus cash is \$155,000,000. In the primary material Glen Alden, under fortunately the compulsion of a higher order

A1470

then David J. Connor & Company, and the Schenley minority stockholders, has had to say just what they intend to do with that money, and they say -- I am now at Page 1 of the proxy material, your Honor, the second full paragraph in black type -- they say:

"It should also be noted that in connection with the reorganization Schenley will transfer to Glen Alden substantial funds of Schenley, including a substantial part of the proceeds received by Schenley from the recent sale of its subsidiary, the Duckingham Corporation."

Now, if you will jump to Page 3 a little more flesh is added to those bones because it then goes on to say, in Paragraph 2, that these funds, having said that substantial funds will be transferred to Glen Alden, it then goes on and says:

"These funds will initially be added to Glen Alden's general working capital and will provide a source for payment of current maturities of Glen Alden's long-term debt."

Now, just what have they done here? They have given the Schenley stockholder a Glen Alden debt note which Standard & Poor's rates as triple-B, highly speculative. They have given the Schenley stockholder \$5 in cash,

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

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THE COURT: Who is appearing for the motion?

MR. ODELL: I am, sir. My name is Herman Odell.

THE COURT: All right. I will hear you first.

MR. ODELL: Your Honor, before I get into the merits

of my application, I would just like to bring you up to date on some of the background in this case.

Before I made this application I knew that in another case, on different grounds, an application had been made for-- I didn't know whether it was a restraining order or preliminary injunction -- Mr. Silverman, my opponent, called me and told me that application was made before Judge Lasker, I believe, on last Tuesday.

Before I noticed this application, I called Judge Lasker's chambers to tell him what I proposed to do and asked whether, first, I should bring my application to him or bring it to the judge that would be sitting this week.

He suggested that I bring it before the judge that would be sitting this week. At that point I called Judge Gurfein's chambers and told him I was going to make this application and wanted to make a date to be heard, and the telephone call that I got back from Judge Gurfein's chamber was to the effect that he had once had some kind of a relationship as an attorney with Glen Alden and felt he was disqualified and suggested that I call your chambers so that

preliminary injunction is granted?

MR. ODELL: I am going to answer that in just a moment.

5 THE COURT: I am not going to give you very much
6 more time. I have a judges' meeting at four o'clock and I
7 want to hear the opposition.

8 MR. ODELL: The reason why that can't be unscrambled
9 is very simple, your Honor, and it is found at the front
10 part of this proxy statement, and I'll give you the page
11 in just a second.

12 If this merger is consummated, and it can be con-
13 summated on the day of this meeting, Schenley is now sitting
14 with some \$200,000,000 in cash which they realized from the
15 sale of assets not too long ago, Buckingham Subsidiary.
16 They owned I think one of the well-known brands of Scotch.

17 But at page 3 of this proxy statement, under
18 certain significant aspects of the proposed reorganization,
19 there is a paragraph 2 there which says that if this merger--
20 they call it a reorganization here, but it is the merger--
21 becomes effective, that all of the cash of Schenley will be
22 passed up to Glen Alden and Glen Alden is going to use this
23 cash to pay off some of the current maturities on its
24 some \$855 million of debt--

25 MR. SILVERMAN: What are you reading from,

Mr. Odell? You are reading from something that I don't know about.

MR. ODELL: I am reading from page 3, subparagraph 2, here it says as follows:

In the middle of that paragraph No. 2, "Subject to the consummation of the proposed reorganization and the said loan agreement restrictions, substantial funds of Schenley will be transferred to Glen Alden. These funds will initially be added to Glen Alden's general working capital and will provide a source of payment of current maturities of Glen Alden's long term debt."

MR. SILVERMAN: I just didn't hear the \$200,000,00 figure that you mentioned.

4 MR. ODELL: What I am saying is that a lot of this
5 cash is going upstrea n very quickly. So that it is not
6 going to be easy to unscramble this merger because Glen
7 Alden is going to use this money to pay off some of its
8 pressing debts and it is not going to be that easy. That
9 is the first reason.

10 The second reason why I would urge this temporary
11 restraining order upon you is this, your Honor: I'm not
12 trying to enjoin this meeting. I'm trying to enjoin only
13 two things from happening, and both, in my opinion and
14 in my experience, are very ministerial things. They can
hold that meeting.

15 What I want to have happen here is that (a) Glen
16 Alden should be restrained from voting its stock in favor
17 of the merger and (b) Schenley should be restrained from
18 declaring the merger effective on June 17th.

19 So far as I can see, so far as I know, your
20 Honor, I don't think the entry of a restraining order here
21 will cause any loss or injury of any kind of Glen Alden,
22 certainly not to Schenley because the Schenley stockholders
23 don't stand to gain one whit by this merger. They are
24 just being bought out with some papers, with a little cash.
25

ODILL

AFFIDAVIT OF PERSONAL SERVICE

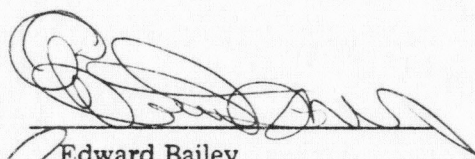
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

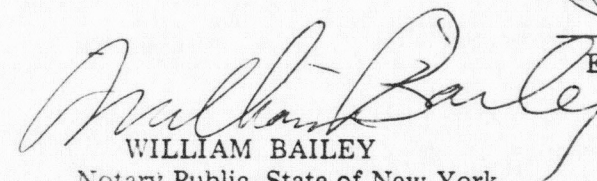
EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 27 day of April, 1977 at No. 120 Broadway, NYC, 1 Battery Park Plaza, NYC; 645 Fifth Ave., NYC 888 Seventh Ave., NYC and 230 Park Ave., NYC

deponent served the within *plaintiffs* upon Fried, Frank, Harris, Shriver, & Jacobson, Esqs.; Simpson, Thacher & Bartlett, Esqs.; RUBIN, BAIT, LEVIN, CONSTANT & FRIEDMAN, Esqs.; MILTON N. SPASOWEIN, Esq. and Charles Trynin, Esq.

the Appellees herein, by delivering true copy(ies) thereof to them personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellees therein.

Sworn to before me this
27 day of April 1977.


Edward Bailey


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978